Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–2215 OF 2000
ABDUL MALIK ISHAK J
27 FEBRUARY 2006

Civil Procedure — Summary judgment — Triable issues — Whether triable issues raised by defendant — Whether plaintiff's claim clear an unequivocal

Contract — Act done to benefit another — Non-gratuitous act — Obligation and liability upon recipient of benefit — Conditions for establishing claim — Contracts Act 1950 s 71

The defendant obtained a loan from the plaintiff. He defaulted in the repayment of the loan. The plaintiff thus filed a civil suit. The parties thereafter executed a settlement agreement, under which it was, inter alia, agreed: (i) that the civil suit against the defendant would be discontinued; (ii) that the defendant would pay the settlement sum to the plaintiff through monthly instalments; (iii) that the defendant was indebted to the plaintiff for the settlement sum. The defendant defaulted in repaying the settlement sum instalments and the plaintiff commenced a fresh civil suit. The plaintiff thereafter filed an application for summary judgment which application was resisted by the defendant. The application was later dismissed by the deputy registrar. The plaintiff thus appealed to the judge in chambers.

Held, allowing the appeal with costs:

(1) The defendant's affidavits failed to 'condescend upon particulars'. Since the defendant had failed to produce any evidence to support his assertions, the defendant was deemed to have not 'condescended upon particulars'. This meant that the defendant's averments had to be construed as mere bare denials and disregarded (see para 12).

(2) It is a daunting task to list down the situations and circumstances wherein an O 14 application would apply. The list can never be closed. In the instant case, the plaintiff was entitled to the settlement sum. There should not be any delay to prevent the plaintiff from obtaining summary judgment bearing in mind that there was no fairly arguable defence to the claim. Here, the plaintiff's claim revolved on the monies that were due to the plaintiff pursuant to the settlement agreement, which was plain and straightforward. The defendant's assertions were baseless and lacking in evidence. Consequently, there was no necessity to have a trial (see para 13).

(3) The defendant was bound under s 71 of the Contracts Act 1950 and legally liable to repay the plaintiff. In the instant case, the four conditions alluded to by Gunn Chit Tuan J in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd, New Hebrides (In Liquidation)* [1987] 2 MLJ 57 to establish a claim under s 71 were satisfied. Firstly, the act was lawful — plaintiff could lend the moneys to the defendant as it was a licensed moneylender under the Moneylenders Act 1951; secondly, the act was done for another person — the sum of money was lent to the defendant and the settlement agreement was entered into for the benefit of the defendant; thirdly, the act was done gratuitously — the plaintiff's intention of entering into the agreements with the defendant was entirely for commercial gains; and fourthly, the other person must enjoy the benefit of the act or its delivery — the defendant had clearly benefited by the plaintiff's withdrawal of its earlier civil action (see para 15).

(4) In the instant case, the plaintiff's claim was rightly worded, was clear and was not ambiguous. There was no discrepancy or confusion in regard to the amount owing by the defendant to the plaintiff (see paras 22–23). The defendant here had misunderstood the available documents which were clear and accurate. The plaintiff in the instant case had complied with the provisions of the Moneylenders Act 1951. The settlement agreement did not also impose any overdue interest and the interest rate imposed by the plaintiff at 16.5% was certainly not excessive. On the facts, the plaintiff's claim was clear an unequivocal. There were no triable issues at all (see para 39).

[Bahasa Malaysia summary

Defendan telah memperoleh pinjaman daripada plaintif. Beliau telah gagal membuat bayaran pinjaman. Plaintif telah memfailkan satu guaman sivil. Pihak-pihak kemudiannya telah menyempurnakan satu perjanjian penyelesaian, di mana telah dipersetujui, antara lain: (i) guaman sivil terhadap defendan tidak diteruskan; (ii) bahawa defendan bersetuju untuk membayar jumlah penyelesaian kepada plaintif melalui bayaran ansuran; (iii) bahawa defendan terhutang kepada plaintif untuk jumlah penyelesaian itu. Defendan telah gagal membuat bayaran balik jumlah penyelesaian secara ansuran itu dan plaintif telah memulakan guaman sivil yang baru. Plaintif kemudian telah memfailkan satu permohonan untuk penghakiman terus yang mana permohonan itu telah ditentang oleh defendan. Permohonan itu kemudiannya telah ditolak oleh timbalan pendaftar. Plaintif oleh itu merayu kepada hakim dalam kamar.

Diputuskan, membenarkan rayuan dengan kos:

(1) Afidavit-afidavit defendan telah gagal untuk 'condescend upon particulars'. Memandangkan defendan telah gagal untuk mengemukakan apa-apa keterangan untuk menyokong penegasannya, defendan dianggap tidak 'condescend upon particulars'. Ini bermakna penegasan defendan hendaklah ditafsirkan sebagai penafian kosong semata-mata dan patut tidak dipedulikan (lihat perenggan 12).

(2) Ia tugas yang menggentarkan untuk menyenaraikan situasi dan keadaan di mana permohonan A 14 terpakai. Senarai tersebut tidak boleh berakhir. Dalam kes semasa, plaintif berhak terhadap jumlah penyelesaian. Kelewatan tidak patut berlaku untuk menghalang plaintif daripada memperoleh penghakiman terus dengan mengambilkira bahawa tiada pembelaan adil dihujahkan terhadap tuntutan tersebut. Di sini, tuntutan plaintif adalah berkisarkan wang yang perlu dibayar kepada plaintif menurut perjanjian penyelesaian, yang jelas dan nyata. Penegasan defendan tidak berasas dan kurang keterangan. Berikutan itu, tiada keperluan untuk perbicaraan (lihat perenggan 13).

(3) Defendan terikat di bawah s 71 Akta Kontrak 1950 dan bertanggungjawab secara sah untuk membayar balik plaintif. Dalam kes semasa, empat syarat secara tidak langsung disebut oleh Gunn Chit Tuan H dalam *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd, New Hebrides (In Liquidation)* [1987] 2 MLJ 57 untuk membuktikan satu tuntutan di bawah s 71 telah dipenuhi. Pertama, tindakan itu sah — plaintif boleh memberikan pinjaman kepada defendan kerana ia adalah peminjam wang berlesen di bawah Akta Pemberipinjam Wang 1951; kedua, tindakan itu telah dilakukan oleh orang lain — jumlah wang yang diberi pinjaman kepada defendan dan perjanjian penyelesaian telah dimasuki untuk faedah defendan; ketiga, tindakan itu tidak sepatutnya dilakukan — niat plaintif memasuki perjanjian dengan defendan semata-mata untuk manfaat komersial; dan keempat, orang lain itu mestilah menikmati faedah daripada tindakan atau penyampaiannya — defendan jelas telah memperoleh faedah daripada penarikan tindakan sivil plaintif yang terdahulu (lihat perenggan 15).

(4) Dalam kes semasa, tuntutan plaintif dinyatakan dengan betul, adalah jelas dan tidak taksa. Tiada percanggahan atau kekeliruan berkaitan jumlah yang terhutang oleh defendan kepada plaintif (lihat perenggan 22–23). Defendan di sini telah salah faham tentang adanya dokumen yang jelas dan tepat. Plaintif dalam kes semasa telah mematuhi peruntukan Akta Pemberipinjaman Wang 1951. Perjanjian penyelesaian juga tidak mengenakan apa-apa faedah yang perlu dibayar dan kadar faedah yang dikenakan oleh plaintif pada kadar 16.5% sememangnya tidaklah melampau. Berdasarkan fakta-fakta berikut, tuntutan plaintif adalah jelas dan tidak taksa. Tiada isu yang perlu dibicarakan (lihat perenggan 39).]

Notes

For a case on s 71 of the Contracts Act 1950, see 3(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2108.

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3243.

Cases referred to

Abdul Samad bin Hj Alias v The Government of Malaysia & Ors [1996] 3 MLJ 581 (refd)

Amanah Merchant Bank Bhd v Sumikin Bussan Kaisha Ltd [1992] 2 MLJ 832 (refd)

American Express Sdn Bhd v Dato Wong Kee Tat & Ors [1990] 1 MLJ 91 (refd)

Associated Finance Corporation Ltd v Poomani [1972] 1 MLJ 117 (refd)

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209 (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons Sdn Bhd & Ors [1989] 1 MLJ 104 (refd)
Casey's Patents, Re; (Steward v Casey) (1892) 1 Ch 104 (refd)
Chong Ngam Sen v Yeoh Bah Chee [1981] 1 MLJ 161 (refd)
Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 (refd)
Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 (refd)
European Asian Bank, AG v Punjab and Sind Bank (No 2) [1983] 2 All ER 508; [1983] 1 WLR 643 (refd)
Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196 (refd)
Keppel Finance Ltd v Phoon Ah Lek [1994] 3 MLJ 26 (refd)
Lagos v Grunwaldt (1910) 1 KB 41 (refd)
Lampleigh v Brathwait (1615) Hob 105 (refd)
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548; [1991] 3 WLR 10 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Mohamed Yusoof v Murugappa Chettiar (1941) FMSLR 106 (refd)
New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd, New Hebrides (in liquidation [1987] 2 MLJ 57 (refd)
Ooi Boon Teong (Trading as Mitsu-Da Construction) v MBf Construction Sdn Bhd [1994] 3 MLJ 413
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
PR SP Periakaruppan Chettiar v Yong Book Fong [1972] 1 MLJ 160 (refd)
Pao On v Lau Yiu Long [1980] AC 614; [1979] 3 All ER 65 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Runnacles v Mesquita (1876) 1 QBD 416 (refd)
Subramaniam Dhanapakiam v Ghaanthimathi [1991] 2 MLJ 447; [1991] SLR 432 (refd)
Supreme Finance (M) Bhd v Bukit Barat Development Sdn Bhd & Anor [1991] 2 CLJ 1394 (refd)
United Malayan Banking Corporation Bhd v Pembinaan KSY Sdn Bhd & Ors [1993] 3 MLJ 45 (refd)
Wallingford v Mutual Society (1880) 5 App Cas 685 (refd)
Wong Kim Fatt v Yong Kwet Yin [1996] 1 MLJ 45 (refd)
Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70; [1992] 3 WLR 366 (refd)

Legislation referred to

Contracts Act 1950 s 71
Contracts Act (Malay States) Ordinance 1950 s 71
Moneylenders Act 1951 ss 2A(2), 19, 21
Rules of the High Court 1980 O 14, O 79 r 3

Chong Boon Cheak (Tay Tee & Nasir) for the plaintiff.
Jeffrey John (Shafee & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] This was the plaintiff's appeal to the judge in chambers in encl 12 against the decision of the learned deputy registrar who dismissed the plaintiff's application under O 14 of the Rules of the High Court 1980 ('RHC'). I allowed the plaintiff's appeal in encl 12 with costs and I, consequently, closed the court file since the matter had been disposed off. I now set out the reasons for doing so.

THE FACTS

[2] The plaintiff is a licensed money lending company under the Moneylenders Act 1951 and the plaintiff was given specific exemptions by the Ministry of Housing and Local Government under s 2A(2) of the Moneylenders Act 1951. The plaintiff's licenses have been exhibited in the plaintiff's affidavit in encl 6 as exh 'LTS-10'. The exemptions too have been gazetted in the Government gazette and marked as exh 'LTS-11' annexed to encl 6.

[3] The defendant, on the other hand, is an individual residing at No 1, Jalan Padungan, Kuching, Sarawak.

[4] Now, at the request of the defendant and by way of a memorandum of agreement for a loan dated 23 May 1997, the plaintiff granted a term loan facility to the defendant for the colossal sum of RM10m (hereinafter referred to as the 'loan agreement' which has been exhibited as exh 'LTS-1' of the plaintiff's affidavit in encl 5). As security for the said loan agreement, the defendant executed a memorandum of deposit of shares dated 23 May 1997 ('the said memorandum') based on the shares of PWE Industries Berhad and/or the shares of Ekran Berhad. A copy of the said memorandum can be seen in exh 'LTS-2' annexed to the plaintiff's affidavit in encl 5.

[5] Acting on the instructions of the defendant vide the defendant's notice dated 23 May 1997, the plaintiff had on 26 May 1997 released the sum of RM10m to Ekran Berhad in accordance with the terms of the loan agreement. The defendant's notice dated 23 May 1997 has been exhibited as exh 'LTS-13' annexed to the plaintiff's affidavit in encl 10. So, as instructed by the defendant, the plaintiff released the sum of RM10m to Ekran Berhad by way of a banker's cheque No 050107 dated 26 May 1997. It can be surmised that three days after the loan was approved vide the loan agreement, the plaintiff released the sum of RM10m to the defendant through Ekran Berhad. That was indeed expeditious and swift.

[6] Pursuant to section 4.01 of the loan agreement, the term loan was for a period of six months from the date of the first draw down and that would be on 26 November 1997 ('the loan period'). Further pursuant to section 4.02(a) of the loan agreement, the defendant undertook to repay in one lump sum all amounts

outstanding including interests as at the end of the loan period. Unfortunately, the defendant had failed to repay the loan at the end of the loan period and this prompted the plaintiff to file an action in the High Court of Kuala Lumpur vide Suit No D3–22–2499–1998.

[7] The parties met in order to iron out their differences. On 27 October 1998, the plaintiff and the defendant entered into a settlement agreement dated 27 October 1998. Under this settlement agreement, it was agreed, inter alia, that the defendant would pay the plaintiff a settlement sum of RM7,208,611.76 ('the settlement sum'). By virtue of the settlement agreement, suit number D3–22–2499–1998 was discontinued on 11 November 1998 by consent of both the parties. It is interesting to note that the settlement agreement dated 27 October 1998 has been exhibited as exh 'LTS-4' to the plaintiff's affidavit in encl 5 while the notice of discontinuance dated 11 November 1998 is marked as exh "LTS-9' to the plaintiff's affidavit in encl 6. It must be borne in mind that the basis and purpose of the settlement agreement found expression in Recitals 'D' and 'E' of the settlement agreement itself. Those Recitals state as follows:

> (D) The lender has instituted legal proceedings against the borrower(s) for, inter alia, the recovery of the term loan and all other monies payable under the loan agreement and the suit no: D3–22–2499–1998 is pending at the High Court of Malaya at Kuala Lumpur (hereinafter referred to as 'the pending legal action').
>
> (E) In consideration of the lender having agreed at the borrower's request to forbear from disposing the said shares under the memorandum of deposit of shares and to withdraw the pending legal action the lender and the borrower(s) have agreed to enter into this agreement to provide for the repayment of the settlement sum by the borrower(s) in accordance with the terms and conditions hereinafter contained.

[8] By way of section 3.01 of the settlement agreement the defendant had admitted his indebtedness to the plaintiff amounting to RM7,208,611.76 as at 30 September 1998 — referring to the settlement sum. The defendant had agreed to repay the settlement sum in the manner as provided for in section 3.02 of the settlement agreement, the excerpt of which reads as follows:

> In consideration of the lender having agreed at the borrower(s)' request to withdraw the pending legal action … the borrower(s) hereby agrees covenants undertakes to repay the settlement sum to the lender by twelve (12) monthly instalments (hereinafter referred to as 'the instalments') that is by eleven (11) equal monthly instalments of Ringgit Malaysia Five Hundred And Sixty Thousand (RM560,000.00) only each and one final instalment of Ringgit Malaysia One Million And Forty Eight Thousand And Six Hundred And Eleven And Cents Seventy Six Only (RM1,048,611.76) the first of such instalment shall be paid on or before 1st November 1998…

[9] It was also agreed between the parties that when the defendant fully repaid the settlement sum within the stipulated time, the plaintiff shall waive all interests chargeable on the settlement sum commencing 1 September 1998. It must be borne in mind that the plaintiff's waiver of interest was subject to the proviso in section 4.03 of the settlement agreement which provides that if the defendant shall default, the defendant shall cease to be entitled to the waiver of the interest. The events of

default are defined in section 5.01 of the settlement agreement and paragraph (a) of section 5.01 of the settlement agreement is hereby reproduced:

> There shall be an event of default if:
>
> (a) the borrower(s) shall default in the payment to the lender of any one or more of the instalments herein covenanted to be paid after the same shall have become due by the borrower(s) to the lender whether formally demanded or not.

[10] And in the event of default, it was agreed, inter alia, between the parties that the plaintiff was entitled to the remedies as stated in section 6.01 of the settlement agreement which is worded as follows:

> Notice to remedy breach
>
> At any time after any of the event of default specified in section 5.01 hereof shall have occurred and so long as the same shall be continuing, it shall be lawful for the lender forthwith to give notice to the borrower(s) to declare that:
>
> (a) this agreement shall forthwith be terminated; and/or
>
> (b) the outstanding settlement sum shall forthwith be due and repayable together with the interests on the whole settlement sum calculated at the prescribed rate on monthly rests commencing from 1st September 1998 until the date of actual settlement (notwithstanding any judgment that may have been obtained by the lender against the borrower(s)) and all other sums, if any payable under the security documents and/or this agreement; and/or
>
> (c) the lender shall no longer be obliged to forbear from disposing the said shares;
>
> WHERE UPON such declaration the borrower(s) shall forthwith without any further demand from the lender repay to the lender the outstanding settlement sum and all interests and other sums referred to in subsection (b) hereof and the lender shall simultaneously be entitled without further notice to or concurrence of the borrower(s) to do any of the following:
>
> (d) proceed with the pending legal action or to institute such proceedings and take such steps as the lender may think fit to enforce repayment or payment of the outstanding settlement, the interest on the outstanding settlement sum calculated at the prescribed rate in the manner referred to in subsection (b) hereof and all other sums, if any payable under the security documents and/or this agreement and/or
>
> (e) sell, dispose or otherwise deal with the said shares in any manner provided by the terms and conditions of the memorandum of deposit of shares.

[11] Factually speaking, it must be emphasised that the defendant had since failed, refused and/or neglected to repay the instalments and therefore had defaulted within the meaning of section 6.01 of the settlement agreement. To add salt to the injury, the defendant had failed to deposit the additional shares which was agreed between the parties as reflected in the plaintiff's letters dated 25 November 1999 and 21 December 1999 within the stipulated time period. Now, it must be borne in mind that the plaintiff had vide its letters dated 12 July 2000 and 9 February 2000 requested the defendant to remedy his default under the settlement agreement but the defendant refused to do so. Subsequently, the plaintiff through its solicitors issued and delivered a letter of demand dated 17 August 2000 to the defendant's last known

address demanding repayment of the whole amount which was due at that point of time and that letter of demand together with the proof of posting has been exhibited as exh 'LTS-6' annexed to the plaintiff's affidavit in encl 5. It must be borne in mind that the plaintiff and/or its solicitors had properly effected service of the letter of demand in accordance with the requirement of section 7.06 of the settlement agreement wherein it was agreed that notices would be deemed sufficiently served on the defendant if it was sent, inter alia, by registered post. Even though the letter of demand was sent to the defendant, the defendant still failed, refused and/or neglected to pay the whole of the sum claimed by the plaintiff. In compliance with the provisions of s 21 of the Moneylenders Act 1951, the plaintiff presented a statement of account under the First Schedule in accordance with s 19 of the Moneylenders Act 1951 of the said Act and that would surely indicate the indebtedness of the defendant. Even the details of the defendant's account in accordance with O 79 r 3 of the RHC was deposed in para 5 of the plaintiff's affidavit in encl 18.

ANALYSIS

[12] It must be emphasised that the defendant admitted that he entered into the settlement agreement and the terms and conditions of that settlement agreement are sufficiently clear and have been alluded to earlier. By way of a rebuttal, the defendant advanced certain issues in his affidavits which included the issue that there were variations to the terms of the settlement agreement but, with respect, none of these issues were supported by any form of evidence. The defendant's affidavits failed to 'condescend upon particulars' (per Lord Blackburn in *Wallingford v Mutual Society* (1880) 5 App Cas 685 at p 704, HL). Since the defendant has failed to produce any evidence to support his assertions, the defendant must be deemed to have not 'condescend upon particulars' and this meant that those averments must be construed as mere bare denials and they should be rightly disregarded.

[13] It must be recalled that a settlement agreement was entered into whereby the defendant agreed to repay the settlement sum of RM7,208,611.76 by way of instalments but the defendant defaulted in its repayment. This prompted the plaintiff to issue the letters of demand dated 9 February 2000, 12 July 2000 and 17 August 2000. And the plaintiff initiated this suit when the defendant failed to comply with the plaintiff's demand. It was part and parcel of my judgment that the facts were sufficiently clear to warrant a summary judgment under O 14 of the RHC. Indeed a summary judgment application applies to a variety of situations. It would apply to an action for a debt or liquidated demand and this would also include a claim based on a quantum meruit (*Runnacles v Mesquita* (1876) 1 QBD 416; and *Lagos v Grunwaldt* (1910) 1 KB 41, CA). It would also apply to a claim based on a progress payment certificate in a building contract (*Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, SC; and *Ooi Boon Teong (Trading as Mitsu-Da Construction) v MBf Construction Sdn Bhd* [1994] 3 MLJ 413). It would certainly apply to a claim based on an interest free friendly loan as exemplified in *Wong Kim Fatt v Yong Kwet Yin* [1996] 1 MLJ 45; and *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] 2 MLJ 447; [1991] SLR 432. It would even apply to a claim for unliquidated damages (*Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209, SC). It is indeed a daunting task to

list down the situations and circumstances wherein an O 14 application would apply. The list can never be shortlisted; it can never be closed. Thus, it has been held, time and again, that an O 14 procedure is apt and appropriate where the matter to be disposed of involves merely construction of a few documents (*Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168; *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196, FC; and *Carlsberg Brewery Malaysia Bhd v Soon Heng Aw & Sons Sdn Bhd & Ors* [1989] 1 MLJ 104), or where the sole issue involves a question of law notwithstanding the fact that it is a difficult one to handle (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183, SC; *United Malayan Banking Corporation Bhd v Pembinaan KSY Sdn Bhd & Ors* [1993] 3 MLJ 45, SC; *American Express Sdn Bhd v Dato Wong Kee Tat & Ors* [1990] 1 MLJ 91, SC; *Supreme Finance (M) Bhd v Bukit Barat Development Sdn Bhd & Anor* [1991] 2 CLJ 1394; *Amanah Merchant Bank Bhd v Sumikin Bussan Kaisha Ltd* [1992] 2 MLJ 832; *Keppel Finance Ltd v Phoon Ah Lek* [1994] 3 MLJ 26; *European Asian Bank, AG v Punjab and Sind Bank (No 2)* [1983] 2 All ER 508; [1983] 1 WLR 643, and *Chong Ngam Sen v Yeoh Bah Chee* [1981] 1 MLJ 161, FC). Here, the plaintiff was certainly entitled to the settlement sum and there should not be any delay to prevent the plaintiff from obtaining the summary judgment bearing in mind that there was no fairly arguable defence to the claim (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*). It is salutary to remember that the O 14 application enables the plaintiff to obtain a final judgment without a trial. Having admitted executing the settlement agreement, the defendant cannot resile from it. The defendant must be held accountable to pay the settlement sum to the plaintiff. I was more than satisfied that there were no triable issues in this case. It seemed to me that the defendant was trying his level best to convince me that the issues at hand were complex and triable. I beg to disagree. It was, in fact, a plain and straightforward case that should not proceed for trial. Raja Azlan Shah J (as His Majesty then was) once said in *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd*at p 171 that:

> … an order under RSC O 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary application should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

Here, the plaintiff's claim revolved on the monies that were due to the plaintiff pursuant to the settlement agreement, which was plain and straightforward as compared to the defendant's assertions which were baseless and lacking in evidence, and, consequently, there was no necessity to have a trial.

[14] The settlement agreement showed that the defendant was indebted to the plaintiff in the sum of RM7,208,611.76 being the settlement sum out of which the sum of RM5,088,787.73 as at 1 November 2000 and further interest remained outstanding. It cannot be denied that the defendant was bound to comply under s 71 of the Contracts Act 1950 (Act 136) and must be held legally liable to repay the plaintiff. That section reads as follows:

> 71. Obligation of person enjoying benefit of non-gratuitous act.

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> *ILLUSTRATIONS*
>
> (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
>
> (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

And Gunn Chit Tuan J (as he then was) in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd, New Hebrides (in liquidation* [1987] 2 MLJ 57, had occasion to deal with s 71 of the Contracts Act (Malay States) Ordinance 1950 and this was what his Lordship said (see p 63 of the report):

> Counsel then referred to the Privy Council case of *Siow Wong Fatt v. Susur Rotan Mining Limited and Another* [1967] 2 MLJ 118 in which it was held, inter alia, four conditions must be satisfied to establish a claim under s 71 of the Contracts (Malay States) Ordinance 1950. The doing of the act or the delivery of the thing referred in the section: (1) must be lawful, (2) must be done for another person, (3) must not be intended to be done gratuitously, (4) must be such that the other person enjoys the benefit of the act or the delivery. Counsel then stated that s 71 of our Contracts Act is similar to s 70 of the Indian Contracts Act but submitted that s 71 only referred to services rendered or work done. He also submitted that there must be delivery of goods and not money and that the defendant had not enjoyed the benefit of the money received because the same money had passed on to another company.

Further down the same page and spilling over to p 64 of the report, his Lordship Gunn Chit Tuan J (as he then was) said:

> As the monies in question have not been returned to the plaintiff, he submitted that there was a legal liability to repay the said sums and that the said loans could have been made orally without a written agreement. As regards s 71 of the Contracts Act, Mr Thomas also referred to the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Limited & Anor* and stated that defence counsel had construed the said s 71 of the Contracts Act restrictively. He submitted that the giving of a bank draft is also "the doing of anything" and added that there was no limitation that s 71 must be restricted to the delivery of goods only.

Finally, his Lordship Gunn Chit Tuan J (as he then was) concluded at p 66 of the report in this way:

> As s 71 of our Contracts Act 1950, applied in this case, it was only necessary to consider whether the four conditions referred to by their Lordships in the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Limited & Anor* have been satisfied to establish the plaintiff's claim under that section. The doing of the act or the delivery of the thing, that is, the two drafts by the plaintiff to the defendant in this case was in my judgment lawful. It was done for the defendant, that is, the two bank drafts were sent by the plaintiff to the defendant and there was no evidence to show that the two sums in question were intended to be gratuitous payments by the plaintiff to the defendant. In fact the ledger sheet in respect of the defendant (P 13) in the plaintiff's General Ledger and Journal shows that the two sums of US$25,000 and US$100,000 were loans or advances. I was also satisfied on the evidence that the defendant had enjoyed the benefit of the act or the delivery of those two bank drafts and that it was thereby able to use the proceeds therein for payment of monies to another company as evidenced by the cheque marked D19. As all the four conditions of

A the said section have been satisfied, the plaintiff has, therefore, established its claim under section 71 of the Contracts Act 1950, and was therefore also entitled to judgment as pleaded in the further alternative.

Lee Hun Hoe CJ (Borneo) delivering the judgment of the then Supreme Court at pp 66–68 of the report refused to interfere with the decision of Gunn Chit Tuan J B (as he then was) in that case.

[15] In the context of the present appeal before me, the four conditions as alluded to by Gunn Chit Tuan J (as he then was) in that case must be satisfied in order to establish a claim under 71 of the Contracts Act 1950 (Act 136). In my judgment, the C four conditions have been satisfied and for convenience I will now consider them:

(1) Must be lawful

The act of the plaintiff lending the defendant the monies as mentioned earlier and the settlement agreement that was entered between the parties D were entirely lawful because the plaintiff is a licensed moneylender under the Moneylenders Act 1951.

(2) Must be done for another person

The memorandum of agreement for the loan clearly showed that the sum of money was lent to the defendant and the settlement agreement was E entered into for the benefit of the defendant.

(3) Must not be intended to be done gratuitously

From the memorandum of agreement for the loan and the memorandum of deposit of shares together with the settlement agreement, it can readily be surmised that the plaintiff's intention of entering into those agreements F was entirely for commercial gains. Being a licensed moneylender, the plaintiff was legally authorised, in the course of running its business, to grant the loan to the defendant. Such acts were not done gratuitously.

(4) Must be such that the other person enjoys the benefit of the act or the delivery

G The defendant had certainly benefited by the plaintiff's withdrawal of its action in Suit No D3–22–2499–1998 which was initiated pursuant to the memorandum of agreement for a loan.

[16] Now, s 71 of the Contracts Act 1950 (Act 136) requires proof that the H promisee did not effect the performance or delivery with a gratuitous intent. It is unthinkable to even think that the plaintiff here would be so magnanimous as to grant the defendant the term loan facility of RM10m free of charge. At common law too there is a requirement that there must be an understanding that the promisee would be remunerated for his efforts and it is this kind of scenario that takes the fact situation out of the rubric of past consideration. Lord Scarman's requirement in *Pao* I *On v Lau Yiu Long* [1980] AC 614 at p 629; [1979] 3 All ER 65 at p 74 that the promise must be 'legally enforceable' is also reflected by the usage of the word 'lawfully' in s 71 of the Contracts Act 1950 (Act 136). In *Pau On*, Lord Scarman had this to say and this very passage has been quoted frequently by other Judges before me (see p 629 of the AC report and p 74 of the All ER):

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated further by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit must have been legally enforceable had it been promised in advance.

The literal language employed in the two illustrations to s 71 of the Contracts Act 1950 (Act 136) as reproduced earlier seemed to suggest that there be no request by the promisor for the benefit conferred upon him by the promisee. Here, the conferment of the loan of RM10m to the defendant are 'legally enforceable'. The defendant had enjoyed the benefit of the loan and the plaintiff had advanced the loan 'not intending to do so gratuitously'. Section 71 of the Contracts Act 1950 (Act 136) is said to be wider in scope than the common law exception. It has been described in *Mohamed Yusoof v Murugappa Chettiar* (1941) FMSLR 106 at p 113 to go 'far beyond the English law'. It is clear that s 71 of the Contracts Act 1950 (Act 136) does not deal with a situation of past consideration simpliciter. Rather the provision is premised on that all interesting concept of restitution. It is here that s 70 of the Contracts Act 1950 (Act 136) may come into play and that section enacts as follows:

> A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

And Suffian FJ (as he then was) in *PR SP Periakaruppan Chettiar v Yong Book Fong* [1972] 1 MLJ 160 , p 161, analysed s 70 of the Contracts Act 1950 (Act 136) in this way:

> To succeed, the plaintiff must in my opinion satisfy three conditions:
>
> (a) the third defendant was bound by law to pay money;
>
> (b) the third defendant did not pay and so the plaintiff paid it; and
>
> (c) the plaintiff was interested in the payment of that money.

The law relating to restitution has developed rapidly. Basically, it seeks to prevent unjust enrichment (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; [1991] 3 WLR 10; and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70; [1992] 3 WLR 366). The law of restitution is concerned with those situations where the defendant has been unjustly enriched at the expense of the plaintiff.

[17] Lord Scarman's exposition of the law as reproduced earlier in *Pau On* is certainly well received. The first requirement mentioned by Lord Scarman in *Pau On* is provided by the case of *Lampleigh v Brathwait* (1615) Hob 105 and the facts there may be stated as follows. Brathwait had killed a man and he requested that Lampleigh should try to get him a pardon from the King. Lampleigh did as requested, which involved making journeys at his own expense, and obtained a pardon for Brathwait. Afterwards, Brathwait promised to pay him £100 for his endeavours. He then failed to pay Lampleigh and was sued by him. Brathwait's defence was that the act had been performed before the promise of a reward was made. The court found in favour of Lampleigh and rejected the argument that the consideration was past. The court stressed that the plaintiff's service was performed at the request of the defendant and his later promise to pay for it was binding.

[18] The second requirement mentioned by Lord Scarman in *Pau On* is illustrated by the case of *Re Casey's Patents; (Steward v Casey)* (1892) 1 Ch 104 and the facts there may be stated as follows. Stewart and Charlton, the joint owners of certain patent rights wrote to Casey stating that, in consideration for his services as practical manager in working their patents, they promised to give him a one-third share of the patents. They later transferred the letters patent to Casey. After the death of Stewart, it was argued by Charlton and by Stewart's executor that Casey was not entitled to possession of the letters patent. Casey contested this and argued that, as owner of a one-third share in the patents, he was entitled to possession. The question for the Court of Appeal to decide was whether Casey provided consideration for the promise made to him by Stewart and Charlton in the letter. The plaintiffs contended that it was a case of past consideration, but this argument was rejected by the court which found in favour of the defendant. The Court of Appeal was willing to imply an understanding between the parties, at the time the services by Casey were performed, that they would be remunerated. The later promise was therefore part of the same transaction; it merely fixed the amount of remuneration for which the service was originally rendered and, accordingly, consideration was not past in these circumstances, despite appearances to the contrary.

[19] It can thus be seen that the general rule that past consideration is not a good consideration can be avoided by judicial ingenuity as demonstrated in the case of *Re Casey's Patents; (Stewart v Casey)*.

[20] I will now consider the other issues raised by the defendant not in its chronological order.

THE PLAINTIFF'S CAUSE OF ACTION WAS SAID TO BE AMBIGUOUS

[21] The defendant argued along the following lines. That in the plaintiff's statement of claim, the plaintiff stated that its action was premised on the Moneylenders Act 1951 but in its submission the plaintiff stressed that the action against the defendant was based on the settlement agreement dated 27 October 1998. And again, in paragraph 7 of the plaintiff's affidavit in encl 10, the plaintiff reiterated its stand that the action filed herein stemmed from the defendant's breach in complying with the terms of the settlement agreement and not from the Moneylenders Act 1951. Such ambiguity, according to the defendant, gave rise to a triable issue that should proceed to trial. It was imperative, according to the defendant, that if this action was not an action under the Moneylenders Act 1951 then the plaintiff's position would not be regulated pursuant to the provisions of that Act. On the contrary, it was emphasised that if the plaintiff's action was based on the settlement agreement then the parties rights would be governed by the terms of the settlement agreement. It was also the defendant's stand that although there existed a settlement agreement, that settlement agreement was contrary to the provisions of the Moneylenders Act 1951 and this would entitle the court to go behind the loan that had been granted under the Moneylenders Act 1951.

[22] By way of a rebuttal, the plaintiff emphasised that the governing provisions would be the Moneylenders Act 1951 and not the Contracts Act 1950 (Act 136).

It was the plaintiff's stand that its cause of action accrued from the settlement agreement which in turn was governed by the Moneylenders Act 1951 and, consequently, the plaintiff's claim was rightly worded and was clear and was not ambiguous. I wholeheartedly agreed with the plaintiff's stand.

THE TRUE AMOUNT OWING

[23] According to the defendant, there was confusion in regard to the true amount which the defendant owed to the plaintiff. The defendant submitted that the plaintiff should have filed a further affidavit to correct the wrong perception instead of confusing this court as to the amounts that were due and owing as at 26 November 1997. But, in reality, the plaintiff has affirmed a further affidavit in encl 10 and there the plaintiff explained and corrected the erroneous statement in the affidavit in encl 6. At paragraph 5 of the affidavit in encl 10, the plaintiff explained that:

> … there was an error at the said paragraph 9 of enclosure 6 in respect of the date 26 November 1997. It was supposed to refer to the indebtedness as at 31 December 1997 as duly stated in the plaintiff's letter which was exhibited as 'LTS-8'.

This meant that the plaintiff had filed a further affidavit clarifying the mistake in the manner as suggested by the defendant. That being the case, there was no confusion in regard to the true amount owing by the defendant to the plaintiff. In fact, by way of an affidavit in encl 5 at paras 7 and 8, the plaintiff averred that:

> … pursuant to the said loan agreement by the defendant on 26 May 1997 and the repayment period was fixed on 26 November 1997.

Furthermore, it was even stated at paragraph 2 of exh 'LTS-8' that the 'repayment date is on 26 November 1997" and that the date '31 December 1997' only indicated the balance of the amount due as at 31 December 1997 which was set out at paragraph 3 of exhibit 'LTS-8" which categorically stated that the, 'Total outstanding amount due as at 31 December 1997 … '.

[24] It seemed to me that it was the defendant who was confusing this court by submitting that 'the 6 months' repayment period falls on 26 November 1997' and at the same time submitting that 'the repayment period commences on 31 December 1997'.

[25] The sum total of it all would be this. That there was no discrepancy or confusion in regard to the amount owing by the defendant to the plaintiff.

THAT THE STATEMENT OF ACCOUNT IN ACCORDANCE WITH SECTION 19 OF THE MONEYLENDERS ACT 1951 WAS SAID TO BE WRONG AND INACCURATE

[26] This was the stand of the defendant. According to the defendant, the statement of account exhibited as exh 'LTS-7' annexed to the affidavit in enclosure 5 was wrong and was not reflective of the loan agreement dated 23 May 1997 and the settlement agreement dated 27 October 1998. It seemed that the statement of

account stated that the principal amount owing to be RM7,208,611.76 although the principal agreement was said to be in the sum of RM10m.

[27] With respect, the defendant was way off target and was attempting to confuse this court by relating the principal sum of one agreement with that of another. In reality, the amount of RM7,208,611.76 constituted the settlement sum under the settlement agreement (see Recital 'D' of exh 'LTS-4' at p 88 of the affidavit in encl 6) whereas the principal amount of RM10m was the amount as set out under the loan agreement. It was rather obvious that the defendant was attempting to confuse the facts by relating the principal sum under the loan agreement with the sum under the settlement agreement. From the facts, it was clear that the sum of RM7,208,611.76 was agreed between the parties as the settlement sum that was due from the defendant to the plaintiff and hence it constituted the principal sum under the settlement agreement.

[28] In regard to the interest rate, I have this to say. That the interest rate should be 16.5% pa as per the settlement agreement for the simple reason that this was what was agreed upon between the parties. Furthermore, the plaintiff was allowed to charge the interest rate of 16.5% pa pursuant to s 2A(2) of the Moneylenders Act 1951 which enacts as follows:

> 2A(2)
>
> The Minister may —
>
> (a) in consideration of the special circumstances relating to the nature of the business of any company, or the objects of any society, and its financial standing; and
>
> (b) if he is satisfied that it would not be contrary to the public interest to do so,
>
> by notification in the *Gazette* exempt such company or society from all or any of the provisions of this Act, and such exemption shall be granted for such duration as may be specified in the notification, and may be made subject to such limitations, restrictions or conditions as the Minister may specify in the notification."

Section 22 of the Moneylenders Act 1951 would also be of assistance to the plaintiff. There it states as follows:

> 22. Interest above 12 per centum per annum for a secured loan or 18 per centum per annum for an unsecured loan presumed excessive.
>
> (1) Where in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act it is found that the interest charged exceeds in the case of a secured loan the rate of twelve per centum per annum or in the case of an unsecured loan the rate of eighteen per centum per annum, the Court shall, unless the contrary is proved, presume for the purposes of section 21 that the interest charged is excessive and that the transaction is harsh and unconscionable or substantially unfair, but this provision shall be without prejudice to the powers of the Court under that section where the Court is satisfied that the interest charged, although not exceeding twelve per centum per annum, or eighteen per centum per annum as the case may be is excessive or that the transaction is harsh or unconscionable or substantially unfair.

(2) Where a Court reopens a transaction of a moneylender under section 21 the Court may require the moneylender to produce any licence granted to him under this Act and may cause such particulars as the Court thinks desirable to be endorsed on any such licence and a copy of the particulars to be sent to the Registrar.

(3) The powers of a Court under section 21(3) may be exercised notwithstanding the moneylender's right of action for the recovery of the money lent is barred.

(4) In no case shall interest at any time be recoverable by a moneylender of an amount in excess of the sum then due as principal unless a Court, having regard to all circumstances, otherwise decrees.

(5) No person who is neither a moneylender nor one of the persons referred to in section 2A(1) and (2) shall, in respect of money lent by him, in any case recover in excess of the money actually lent by him (whether the excess be claimed by way of interest or otherwise) any sum greater than an amount equal to simple interest at the rate of twenty per centum per annum on the money actually lent by him.

It must be recalled to mind that the plaintiff had been granted exemptions under s 2A(2) of the Moneylenders Act 1951 for the following duration:

(i) from 12 July 1995 to 11 July 1998 (see exh 'LTS-11' of the affidavit in encl 6); and

(ii) from 12 July 1998 to 11 July 2001 (see exh 'LTS-11' of the affidavit in encl 6).

Both these two exemptions were duly gazetted. Now, emphasis must be placed on the settlement agreement. The settlement agreement provides for repayment by way of instalment which is clearly an admission of liability and the defendant never disputed that he had signed the settlement agreement.

[29] The defendant seemed to have misunderstood the available documents. For instance, at paras 18(a) and 18(b) of the affidavit in encl 8 the defendant asserted that the interests as at 1 November 2000 were 'incorrect in that the settlement amount therein has included variation of interest sum which was not agreed between the plaintiff and the defendant'. This assertion was challenged by the plaintiff as seen at paras 14 and 15 of the affidavit in encl 6. Sadly, the defendant in his affidavit in reply in encl 9 failed to reply and/or produce any evidence to support the defendant's assertions which was challenged by the plaintiff. In my judgment, the defendant failed to condescend upon particulars to a material assertion.

[30] The plaintiff rightly pointed out that exh 'LTS-7' was perfectly accurate. There, at 'Jadual 3' the amounts due and owing from the defendant were listed. The first column of 'Jadual 3' clearly states that the principal accrued amounts to RM4,344,177.79 whereas the third column of 'Jadual 3' shows the interest on the principal which is due each month (see the fourth column of 'Jadual 3'). The total sum in the third column when added up amounts to RM744,609.94 which constitutes the interest accrued up till 1 November 2000. The amount of RM4,344,177.79 when added up with RM744,609.94 amounts to RM5,088,787.73 as stated at para 17 of encl 5 and para 18 of encl (1). It must be borne in mind that the amount of RM7,828,615.19 as stated in exh 'LTS-4' of the affidavit in encl 5 formed part of the settlement agreement and, consequently, it should be read in the context of the settlement agreement. Recital 'C' of the settlement agreement states as follows:

> The borrower has failed to repay the term loan upon expiry of the loan period referred to in the loan agreement and the outstanding principal sum of the term loan as at the 30th day of September 1998 amounts to Ringgit Malaysia seven million two hundred and eighth thousand and six hundred and eleven and cents seventy six only (RM7,208,611.76) ('the settlement sum').

So, the sum of RM7,208,611.76 being the settlement sum as agreed in the settlement agreement was the amount due as at 30 September 1998 inclusive of all the interests up to 31 August 1998 and the proceeds of sale of the shares. Whereas the amount of 'RM7,828,615.19' as contended by the defendant was merely the amount originally due under the loan agreement and before taking into account the interest and the proceeds of sale of the shares bearing in mind that the account was due as at 30 September 1998. However, it should be noted that exh 'LTS-7' is the statement of account as at 1 November 2000 and not 30 September 1998. And that the principal amount stated to be RM7,208,611.76 is in fact the settlement sum as reflected in Recital 'C' of the settlement agreement. Incidentally, exh 'LTS-7' shows the interest from 1 September 1998 right up to 1 November 2000 which was not included at p 99 of the statement of account. Clearly therefore there was no overlapping or discrepancy in the statement of account. That statement of account was rightly done and it can be described as perfectly accurate. It must be pointed out that if the amount of RM1,075,411.48 from the sale of the shares was included in exh 'LTS-7' then it would amount to double deduction to the account because the principal amount of RM7,208,611.76 had already deducted the amount of RM1,075,411.48 from the sale of the shares.

[31] It would be correct to say that there was no inaccuracy in the plaintiff's documents. Rather the so called 'discrepancy' was solely caused by the defendant who failed to properly analyse exhs 'LTS-4' and 'LTS-7' respectively. In this judgment, I have dutifully followed the guidelines laid down by Mohamed Azmi SCJ in the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC. There his Lordship Mohamed Azmi SCJ aptly said at p 408 of the report:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (*See Cow v Casey* [1949] 1 All ER 197 and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at p 516).

[32] In regard to the case of *Associated Finance Corporation Ltd v Poomani* [1972] 1 MLJ 117, that was relied upon by the defendant, that case was decided on the basis that the applicants there had failed to comply with the several provisions of the Moneylenders Ordinance 1951 whereas in the present case before this court the defendant here had clearly misunderstood the available documents which were clear and accurate and the fact that the plaintiff here had complied with the provisions of the Moneylenders Act 1951.

THE OVERDUE INTEREST

[33] Again in arguing that there was an overdue interest, the defendant had misunderstood the available documents. It must be emphasised that the statement of account at p 99 of encl 5 showed interest as well as overdue interest up to 31 August 1998 before the signing of the settlement agreement on 27 October 1998. Both the interest and the overdue interest were originally due from the loan agreement which incidentally provided for the overdue interest. These overdue interest as well as the interest on principal and the principal sum itself would form the settlement sum under the settlement agreement. In sharp contrast would be exh 'LTS-7' of the affidavit in encl 5 which showed the interest at the rate of 16.5% pa as agreed in the settlement agreement and after the signing of the settlement agreement. There was no compounding or penalty interest charged in the settlement agreement at all.

[34] The settlement agreement did not impose any overdue interest. Whereas the loan agreement was an agreement made under the auspices of the Moneylenders Act 1951. It must be recalled that the settlement agreement was signed between the parties with a view of settling the plaintiff's claim pursuant to the moneylending transaction under the Moneylenders Act 1951. It goes without saying that the settlement agreement should come within the purview of the Moneylenders Act 1951. But the defendant took an opposite view. The defendant was of the view that the settlement agreement was not made pursuant to the Moneylenders Act 1951. If what the defendant said was true then it would create a back door for the defendant to circumvent the provisions of the Moneylenders Act 1951 bearing in mind that all sums under the settlement agreement was lent by the plaintiff to the defendant in the moneylending transaction. At this juncture, it is germane to refer to s 3 of the Moneylenders Act 1951 which enacts as follows:

> 3. Certain persons and firms presumed to be moneylenders.
>
> Save as excepted in section 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

The word 'moneylender' is defined in s 2 of the Moneylenders Act 1951 as follows:

> 'moneylender' includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person who possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

In my judgment, the plaintiff being a licensed moneylender the governing statute should be the Moneylenders Act 1951. And bearing in mind that the plaintiff had obtained the relevant exemptions from the Ministry as reflected in exhs 'LTS-11' and 'LTS-12', the interest rate imposed by the plaintiff at 16.5% was certainly not excessive. It was permissible.

[35] Be that as it may, the Contracts Act 1950 (Act 136) is a general legislation whereas the Moneylenders Act 1951 is a specific legislation. It is now trite law that general statements or provisions do not derogate from special statements or provisions: generalia specialibus non derogant (*Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600, SC). It follows therefore that in the event of a conflict the specific legislation shall prevail. This meant that the Moneylenders Act 1951 should be the specific legislation that governs the plaintiff's appeal in encl 12 (*Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581, FC).

EXCLUSION UNDER THE PROVISIONS OF s 2A(2) OF THE MONEYLENDERS ACT 1951

[36] The defendant argued that the exemptions provided by the Minister was ultra vires the Moneylenders Act 1951. The defendant relied heavily on the case of *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, a decision of Raja Azlan Shah J (as His Majesty then was) especially to p 126 where his Majesty aptly said:

> This is indeed a lesson to be learnt by moneylenders in future to be more careful when lending money on a security and also to be sure that the Moneylenders Ordinance has been fully complied with. The Moneylenders Ordinance is calculated to protect borrowers from unscrupulous moneylenders but careless moneylenders are also caught by it.

[37] But the facts leaned in favour of the plaintiff here. For fear of repetition, I must say that the plaintiff here was granted exemptions (see exhs 'LTS-11' and 'LTS-12') by the Minister of Housing and Local Government in 1995 and 1998 respectively. These exemptions were granted pursuant to sn 2A(2) of the Moneylenders Act 1951 which was amended in 1991 and 1992 respectively vide Am PU(A) 406/91 and Am PU(A) 290/92. The case of *Overseas Union Finance Ltd* was decided on 20 1971 based on the Moneylenders Ordinance 1951. Now, the Moneylenders Ordinance 1951 was superseded by the Moneylenders Act 1951. Flowing from these, it can readily be said that the case of *Overseas Union Finance Ltd* can be distinguished and the distinguishing features are as follows:

(1) that **Overseas Union Finance Ltd** was decided based on the older legislation and without the benefit of the amended legislation in the form of the Moneylenders Act 1951;

(2) that the recent amendment of section 2A(2) of the Moneylenders Act 1951 gives the Ministry of Housing and Local Government the relevant power to grant the exemptions as seen in exhibits "LTS-11" and "LTS-12", and that the

case of **Overseas Union Finance Ltd (supra)** was decided without the benefit of section 2A(2) of the Moneylenders Act 1951;

(3) that, in the absence of evidence to the contrary, it must be assumed that Parliament had enacted section 2A(2) of the Moneylenders Act 1951 with full knowledge of the case of *Overseas Union Finance Ltd*; and

(4) that it is common knowledge that due to the economic crisis in this region beginning in the year of 1997, high interest rates levied by the banks were quite common and with this in mind, it can only be presumed that the plaintiff was exempted from the rigours of sections 17, 22 and 23 of the Moneylenders Act 1951 in order to reflect the high interest rates because otherwise it would not be economically viable for the plaintiff to provide loans at the rate of 12% per annum as provided for in the Moneylenders Act 1951.

[38] As demonstrated, the case of *Overseas Union Finance Ltd* can easily be distinguished. That case was decided against the backdrop of a different economic environment and based on the old Moneylenders Ordinance 1951.

CONCLUSION

[39] I have endeavoured to set out the salient arguments of the parties in this judgment. Other inconsequential issues were not ventilated bearing in mind that the plaintiff's claim was clear and unequivocal. There were no triable issues at all. Consequently, the plaintiff's appeal in enclosure 12 should be allowed with costs. The file was then closed.

Appeal allowed with costs.

Reported by John Paul Simon